former mortgage is not a novation and does not forfeit priority as to intervening mortgagees or purchasers with notice. *Howard v. First National Bank of Hutchinson* (1890) 44 Kan. 549; *Hardin v. Elkus* (1898) 24 Nev. 329. This rule was recognized by the Georgia court. It is clear that the vendor could have preserved his position and precedence by keeping the two transactions separate, a mortgage for each. Shall he be penalized for merging the two without otherwise changing the terms of either? The outstanding objection to permitting it seems to be that such permission might sanction wilful "sweetening" of poor security by combining it with good security in one later mortgage at the expense of an intermediate mortgagee. The answer to such an objection in the absence of fraud is probably found by holding the property conveyed to the sub-vendee subject only to the encumbrance which it originally bore—the same as would have continued if no renewal had been granted. *Mayers v. McNeese* (1902) 71 S. W. (Tex. Civ. App.) 68. But after all, a conditional sale is not strictly a chattel mortgage. Williston, *Sales,* sec. 337; *Nichols v. Ashton* (1892) 155 Mass. 205; *Puett v. Edwards* (1915) 17 Ga. App. 645. And especially is this distinction to be noted since Georgia by statute throws the risk of loss upon a conditional vendor, contrary to the general rule. Ga. Code, sec. 4123; Williston, *Sales,* secs. 303-304. If the vendor bears this added burden, he might reasonably expect some compensating advantages. In the principal case the authorities cited by the court were all concerned with chattel mortgages, and in view of the facts above mentioned, it is submitted that these are not entirely in point. A brief analysis of a conditional sale it is believed will cast some light on the case. The purchaser gets among other things a power to divest the title of the vendor upon payment of the notes. The purchaser from the vendee, taking with notice, does not get legal title but does obtain a similar power to acquire title. It is difficult to see where, aside from fraud, he stands in a more favored position than the original vendee. If, then, the novation in the principal case is regarded as a sufficient performance of the condition of payment to divest the title of the vendor in that portion of the chattels which were resold, why would it not affect the whole lot in the same way? And if the title was ever divested, by what means was it restored to the original vendor? The intention of the parties as expressed by the contract was that title was reserved in the vendor, and this language is hardly susceptible of the interpretation that it was intended to pass and re-pass title as in a mortgage transaction. On the other hand, the result arrived at in the Texas case, *supra,* can probably be reached here without distorting the real intention of the parties. It would seem that the vendee could not, without actually paying the debt, transfer good title to his sub-vendee nor release the chattels from the condition precedent, but that he could and did place beyond his own power the possibility of further incumbering the particular chattels in which he had parted with all his interest.

M. S. B.

CONTRACTS—ASSIGNMENT—PERFORMANCE.—THE ROSENTHAL PAPER CO v. THE NATIONAL FOLDING BOX AND PAPER CO. (1917) 56 N. Y. L. J. 1439.—The plaintiff's assignor, the sole owner of a patent, agreed to give

the defendant a license to manufacture and sell the patented article within a specified time and territory, covenanting to "faithfully protect" against infringements. The defendant was to pay *pro rata* royalties on the number sold, the amount of which was to total a certain minimum sum *per annum*. During the specified time the patent and contract were assigned to plaintiff. The plaintiff sued for a deficit of the minimum sum. The defendant proved infringements. *Held*, that the contract was personal to the plaintiff's assignor and not assignable, and that by the assignment the assignor rendered the further performance of the agreement to protect the defendant impossible, and thereby discharged the defendant as to minimum royalties.

When personal performance is the essence of a contract, that is, a condition precedent to the assignor's rights, the contract cannot be assigned, and performance by the assignee will not enable him to enforce the rights. *Brit. Wag. Co. v. Lea & Co.* (1880) 5 Q. B. D. 149; *Robson v. Drummond* (1831) 2 B. & Ad. 303. Where personal performance is not the essence of the contract, that is, where it is not a condition precedent, the contract can be assigned and performance by the assignee will enable him to enforce the rights. *Sears v. Conover* (1866) 3 Key. (N. Y.) 113; *Tyler v. Barrows* (1868) 6 Rob. (N. Y.) 104. If the assignor's duty is such that his executor or administrator would be bound to perform it, then it is not personal, and a vicarious performance would be a fulfilment of conditions and would enable the assignee to enforce the rights. *Devlin v. Mayor* (1875) 63 N. Y. 8, 16; *Woods v. Ridley* (1854) 27 Miss. 119; *White v. Commonwealth* (1861) 39 Pa. St. 167. An assignment does not free the assignor from his liabilities and duties and impose them solely on the assignee. *Arkansas Valley Smelting Co. v. Belden Min. Co.* (1888) 127 U. S. 379. But if the assignee undertakes to enforce the right given to him by the assignor, he must show that all conditions precedent to the existence of such right have been performed either by the assignor or by himself. *Tolerton & Stetson Co. v. Anglo Cal. Bank* (1901) 112 Ia. 706; *Atlantic N. C. R. R. Co. v. Atlantic & N. C. R. R. Co.* (1908) 147 N. C. 368; *Rockwell v. Edgcomb* (1913) 72 Wash. 694. Hence, it is submitted that the decision in the principal case is correct, there being no performance on the part of either assignee or assignor of the conditions precedent to the right to royalties.

F. C. H.

CONTRACTS—CONDITIONS PRECEDENT AND SUBSEQUENT—BURDEN OF PROOF.—DAVID V. CITY NATIONAL SECURITIES COMPANY (1916) 161 N. Y. S. 174.—A assigned to the defendant certain accounts to be collected by the latter and paid over to third parties. If a certain event took place the defendant was then to reassign to A except that he was not to reassign unless the said third parties performed according to other conditions named in the agreement. The plaintiff received an assignment of the same accounts from A, and in this action sought to force the defendant to transfer them to him. He alleged generally that all conditions had been performed. *Held*, that the conditions were conditions subsequent and should have been pleaded and proved by the defendant.